85-282

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85 -

Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE MATURO and
JERALD FRENCH,

Petitioners,

— v. —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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On the Petition:
David A. Ruhnke, Esquire
Jean D. Barrett, Esquire

QUESTION PRESENTED

Whether the requirements of Federal Rule of Evidence 801(d)(1)(B), permitting the use of a witness' prior consistent statements, are met if the statements in question were made after the existence of a motive to fabricate?

TABLE OF CONTENTS

	PAGE NOS.
QUESTION PRESENTED	i
TABLE OF CITATIONS	iv
1. Opinions below	1
2. Statement of Jurisdiction	1
3. Rule of Evidence involved	1
4. Statement of the Case	1
5. Argument for allowance of writ	
THE WRIT SHOULD BE ALLOWED IN THIS MATTER TO RESOLVE THE SPLIT IN THE CIRCUITS ON THE IMPORTANT AND RECURRING QUESTION OF THE EVIDENTIARY PREDICATE REQUIRED FOR THE INTRODUCTION OF A WITNESS' PRIOR CONSISTENT STATEMENTS AS SUBSTANTIVE EVIDENCE	5
A. Second Circuit	6
B. Third Circuit	7
C. Fourth Circuit	7
D. Fifth Circuit	7
E. Sixth Circuit	8
F. Seventh Circuit	8
G. Eighth Circuit	8
H. Ninth Circuit	8
I. Eleventh Circuit	9
CONCLUSION	9

TABLE OF CONTENTS (CONT.)

CONTENTS OF APPENDIX

Oral opinion of Hon. John W. Bissell, United States District Court for the District of New Jersey, delivered June 8, 1984 ..... 1A

Memorandum order, United States Court of Appeals for the Third Circuit, entered May 23, 1985 ..... 3A

Order denying petition for rehearing, entered June 19, 1985 ..... 5A

TABLE OF CITATIONS

CASES	PAGE NOS.
United States v. Baron, 602 F.2d 1248 (7th Cir.), *cert. denied* 444 U.S. 967 (1979)	8
United States v. Feldman, 711 F.2d 758 (7th Cir.), *cert. denied* 104 S.Ct. 352 (1983)	8
United States v. Hamilton, 689 F.2d 1262 (6th Cir. 1982), *cert. denied sub nom. Wright v. United States*, 103 S.Ct. 753 (1983) *and Salisbury v. United States*, 103 S.Ct. 754 (1983)	8
United States v. Harris, 761 F.2d 394 (7th Cir. 1985)	8
United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), *cert. denied* 104 S.Ct. 1006 (1984)	7
United States v. Parodi, 703 F.2d 768 (4th Cir. 1983)	7
United States v. Parry, 649 F.2d 292 (5th Cir., Unit B 1981)	7
United States v. Provenzano, 620 F.2d 985 (3rd Cir.), *cert. denied* 449 U.S. 899 (1980)	7
United States v. Quinto, 582 F.2d 224 (2d Cir. 1978)	6
United States v. Rohrer, 708 F.2d 429 (9th Cir. 1983)	8

TABLE OF CITATIONS (CONT.)

CASES	PAGE NOS.
United States v. Scholle, 553 F.2d 1109 (8th Cir.), *cert. denied* 434 U.S. 940 (1977)	8
Rules	
Fed.R.Evid. 801(d)(1)(B)	1, 2 and passim
U.S. Sup.Ct. Rule 17	
Statutes	
28 U.S.C. §1254	1
28 U.S.C. §3231	1

1. **Opinions below.**

None of the various opinions rendered in this matter are reported. The oral opinion of the Hon. John W. Bissell, United States District Judge for the District of New Jersey, is reproduced at pp. 1A - 2A of Petitioners' appendix. [Hereinafter abbreviated as Pet.App.] The memorandum opinion of the United States Court of Appeals for the Third Circuit, affirming the District Court, is reproduced at Pet.App. 3A, 4A.

2. **Statement of Jurisdiction.**

On May 16, 1985, the United States Court of Appeals for the Third Circuit entered an order affirming the judgments of conviction entered in the District Court. [Pet.App. 3A, 4A.] On June 19, 1985 a timely petition for re-hearing was denied. [Pet.App. 5A.]

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §1254.

3. **Rule of Evidence involved.**

This case involves the meaning and requirements of Federal Rule of Evidence 801(d)(1)(B), which provides in pertinent part:

> (d) **statements which are not hearsay** – a statement is not hearsay if –
>
> (1) **Prior statement by witness** – the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . .
>
> (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.
>
> . . .

4. **Statement of the Case.**

This was a criminal case. The United States District Court for the District of New Jersey had jurisdiction in the first instance pursuant to 28 U.S.C. §3231 which confers upon the

District Courts of the United States "original jurisdiction . . . of all offenses against the laws of the United States."

Rule 801(d)(1)(B) of the Federal Rules of Evidence reads, in pertinent part, as follows:

> A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . .

The issue of the proper predicate for use of a prior consistent statement arose in the following factual context. The prosecution was for theft from interstate shipment and conspiracy to possess goods stolen from interstate shipment. The goods at issue were the contents of a truck stolen from the Fantastic Trucking Co. of Jersey City, New Jersey. Elliot Gregory, an employee of Fantastic, was the individual responsible for the stolen truck. [T2.97.][1] On the day in question, March 19, 1984, Gregory notified the Port Authority Police and his employer that the truck had been stolen at gunpoint. [*Id.*] A day or two after the theft, Gregory was confronted by police with inconsistencies in his story and the fact that he had failed a lie detector test. He thereupon recanted his earlier statements and implicated himself, and others, in the theft of the truck. [T3.31.] Among those he implicated were Petitioners French and Maturo as well as Herman Max Ruth, a co-defendant who entered a guilty plea prior to trial.

There were, therefore, two very different versions of events related by Elliot Gregory. Up until the time that he was confronted with his failure of the lie detector test, Gregory maintained that he had been the victim of an armed hijacking.

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1. References are to the transcripts on file with the Clerk of the United States Court of Appeals for the Third Circuit. Petitioners have not requested certification and transmittal to this Court of that record. See Supreme Court Rule 19.1.

Only after being confronted with his failure of the test, did Gregory implicate others. As will be seen, when Gregory changed his tune he did so in such a way as to minimize his own involvement in the crime.

Gregory testified at trial that in the months prior to the crime he had been repeatedly importuned by Ruth, French and Maturo to cooperate in the faked "theft" of a truck. [T2.37 to T2.70.] Gregory did not drive a truck as a regular matter and no date had been selected for the crime. Nevertheless, on the day in question Gregory was, for the first time during his employment with Fantastic, assigned to take a truck to make pickups at local piers. He had had no prior knowledge that he would receive such an assignment. He did not communicate the fact of receiving that assignment to any of the others.

Immediately after leaving the piers, Gregory parked his truck with the motor running and crossed a street to purchase a soda at a lunch wagon. [T2.81.] While he was waiting on line, he saw his truck drive off and, simultaneously, was tapped on the shoulder by a stranger who told Gregory that "Mack" (meaning Herman Max Ruth) wanted to see him. [T2.84.] The timing was so perfect that Gregory had no opportunity to exclaim to those around them that his truck had just been stolen. [T3.67, 68.]

Gregory was then taken to a car where he found Ruth seated in the rear seat. [T2.85.] Gregory got in, and, with the silent stranger at the wheel, was driven toward Jersey City. [T2.86.] During this drive, two things happened: First, Ruth told Gregory that a debt he had owed to French was now satisfied and that Gregory would receive a cut "off the top" of the proceeds; second, the car coincidentally overtook Gregory's truck and he saw French at the wheel [T2.94; T2.88.]

At trial, over defense objections, the government was allowed to elicit from Gregory and a law enforcement witness [T4.71] the fact that Gregory, after being confronted with his initial lies, had made statements that consistently implicated French, Maturo and Ruth in the crimes. The prior consistent

statements went in as substantive evidence, the court ruling that no limiting instruction was necessary. [T4.25.]

Defense counsel objected to any use of Gregory's prior statements, arguing that his motive to fabricate arose at the time he realized his lies to the Port Authority Police would not hold up. That being the case, the argument went, cross-examination of Gregory did not give rise to any charge of "recent fabrication or improper influence or motive," the legal and logical predicates for admission of a witness' prior consistent statements. Defense counsel's position, as argued to the trial court, was as follows:

> Mr. Gregory's motive to fabricate arose at the moment that he realized he was caught. That is the moment that he failed a polygraph exam and from that point forward he was going to do everything he could to get himself out of trouble, including shifting the blame on other people to every possible extent he could consistent with what he had to eat, if I could use that situation colloquially.
>
> Given the situation he was in he couldn't account for the truck and he knew he was caught in a lie. From that moment on he shifted everything he could onto other people taking only as much of it as he absolutely had to on himself, including this fantastic story about standing at a lunch wagon line when the car pulls up and they steal his truck and at that instant he is tapped on the shoulder by a mysterious stranger.

[T4.12, 4.13.]

The government, as it was entitled to, took maximum advantage of the trial court's ruling. From the opening moments of summation, the government focused on Elliot Gregory's consistent statements:

> Throughout being interrogated by the Port Authority Police, by the F.B.I. and testifying in the Grand Jury,

> testifying here at trial, being cross-examined by Mr. Ruhnke, and Mr. Cammarata for several days, all through those interrogations, all through those testimonies, Elliot Gregory stated over and over again that he, along with French, along with Maturo and along with Mack committed the crime. Throughout all the interrogation that Elliot Gregory went through, throughout all of his testimony, continually and over and over again stated that Mack and Jerry French wanted him to give up a load, that Mack with the approval of Jerry French threatened Elliot Gregory's wife to do harm to her if he didn't cooperate with them . . . at each stage Elliot Gregory was consistent on all of these points.

[T5.92, 5.93.] Shortly thereafter, commenting upon some conceded inconsistencies in Gregory's testimony, the government prosecutor stated, "I also ask you to consider all during this time period Elliot Gregory never once was inconsistent as to who was involved in the crime." [T5.94.] Still later, the prosecutor stated, regarding the believability of Elliot Gregory, "In making that decision, in considering that question, I would ask you to consider, as I said before, the prior consistent statements that Elliot Gregory made." [T5.99.]

To an unusual extent, the strength of the government's case here depended exclusively upon the jury's assessment of Elliot Gregory's credibility. Without Gregory's testimony, there was no damaging evidence linking Maturo or French to the theft. The trial court's decision to allow evidence of prior consistent statements as substantive evidence of their truth contributed importantly to the government's case.

5. **Argument for allowance of writ.**

THE WRIT SHOULD BE ALLOWED IN THIS MATTER TO RESOLVE THE SPLIT IN THE CIRCUITS ON THE IMPORTANT AND RECURRING QUESTION OF THE EVIDENTIARY PREDICATE REQUIRED FOR

THE INTRODUCTION OF A WITNESS' PRIOR CONSISTENT STATEMENTS AS SUBSTANTIVE EVIDENCE.

Rule 17 of this Court's revised rules states that among the reasons that will be considered as favoring review on writ of certiorari is "when a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter; . . ." As the following shows, the question here presented has been ruled upon by nearly all the circuits. The decisions from circuit to circuit are irreconcilable. Indeed, in some instances different panels within the same circuit have reached different results on the question. In the present case, for example, many of the events occurred in Jersey City, New Jersey, a municipality located on New York Harbor directly across from New York City. Had this trial taken place in the Southern District of New York instead of the District of New Jersey, the evidence would never have been admitted.[2] This Court should resolve this conflict so that a criminal defendant's chances of conviction do not increase or decrease depending upon the federal district in which the crimes charged are said to have occurred.

A survey of the circuits reveals a marked division. The majority hold that a prior consistent statement to be relevant, as well as non-hearsay, must have been made before the motive to fabricate existed. However, a significant minority of circuits hold otherwise. Three circuits (the District of Columbia, First, and Tenth) have not addressed this issue in published opinions.

A. Second Circuit.

The most often cited case on the subject is the leading case in the Second Circuit, *United States v. Quinto*, 582 F.2d 224 (2d Cir. 1978). In *Quinto*, which arose out of a prosecution for tax evasion in which intent was the only issue, I.R.S. Agent Wallwork testified that during an interview the defendant

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2. In fact, venue might well have been laid in the Southern District of New York since the stolen truck was recovered from Staten Island, a borough of New York City. [T4.57.]

blurted out, "Okay, I was trying to screw the government out of some cash if I could." The agent was vigorously cross-examined about the conduct of the questioning. The government was then allowed to introduce as substantive evidence, under F.R.Evid. 801(d)(1)(B), the agent's eight page report made after the interview which included what purported to be a quotation of the remarks. *Id.* at 226-31. The Second Circuit reversed, holding that the memorandum was inadmissible under Rule 801(d)(1)(B) because the government could not demonstrate that "the prior consistent statment was made prior to the time that the supposed motive to falsify arose." *Id.* at 234.

B. **Third Circuit.**

The Third Circuit, while commenting favorably on the Second Circuit rule, has not directly considered the issue. See *United States v. Provenzano*, 620 F.2d 985, 1001-02 (3d Cir.) *cert. denied* 449 U.S. 899 (1980).

C. **Fourth Circuit.**

Another variation on the prevailing theme of confusion on this issue is exemplified by the Fourth Circuit, which is internally divided. In *United States v. Parodi*, 703 F.2d 768 (4th Cir. 1983), one panel ruled a prior consistent statement admissible, specifically rejecting the *Quinto* interpretation of Rule 801(d)(1)(B). *Id.* at 785. However, in a decision acknowledging *Parodi*, another panel specifically adopted "the gloss on Federal Rule of Evidence 801(d)(1)(B) that a prior consistent statement is admissible under the rule only if the statement was made prior to the time the supposed motive to falsify arose." *United States v. Henderson*, 717 F.2d 135, 138 (4th Cir. 1983), *cert. denied* 104 S.Ct. 1006 (1984).

D. **Fifth Circuit.**

The Fifth Circuit has come down strongly against a requirement that that statement must pre-date the motive to fabricate. In *United States v. Parry*, 649 F.2d 292 5th Cir., Unit B 1981), a narcotics conspiracy case, the trial court ruled that Parry's mother could not testify about her son's prior consistent statements. In reversing the conviction, the Fifth

Circuit rejected the government's argument that the testimony was properly excluded because Parry's motive to fabricate existed at the time of the statements to his mother. *Id.* at 296.

E. **Sixth Circuit.**

The Sixth Circuit, like the Third Circuit in *Provenzano*, expressed its preference in *United States v. Hamilton*, 689 F.2d 1262, 1273 (6th Cir. 1982), *cert. denied sub nom. Wright v. United States*, 103 S.Ct. 753 (1983) *and Salisbury v. United States*, 103 S.Ct. 754 (1983). Unlike the Third Circuit, however, the Sixth Circuit's preference is for the more relaxed standard rejecting the *Quinto* requirements. *Id.*

F. **Seventh Circuit.**

The Seventh Circuit resembles the Fourth Circuit's intracourt division. The most recent case, *United States v. Harris*, 761 F.2d 394 (7th Cir. 1985), follows *Quinto* and *United States v. Feldman*, 711 F.2d 758 (7th Cir.) *cert. denied*, 104 S.Ct. 352 (1983) as the prevailing rule, imposing the requirement that the prior consistent statement precede the motive to fabricate. *United States v. Harris*, 761 F.2d at 399. However, another off-cited Seventh Circuit case, *United States v. Baron*, 602 F.2d 1248, 1251-52 (7th Cir.), *cert. denied* 444 U.S. 967 (1979), opines that the question may be a fact one for the jury rather than an issue of admissibility.

G. **Eighth Circuit.**

The Eighth Circuit, in a case in which the grand jury testimony of a key witness was admitted to rehabilitate him, did not require that the prior consistent statement precede the motive to fabricate. *United States v. Scholle*, 553 F.2d 1109, 1121-22 (8th Cir.), *cert. denied* 434 U.S. 940 (1977).

H. **Ninth Circuit.**

The Ninth Circuit, while acknowledging the split in the circuits, holds that prior consistent statements must precede the motive to fabricate to qualify for admission into evidence pursuant to R. 801(d)(1)(B). *United States v. Rohrer*, 708 F.2d 429, 433 (9th Cir. 1983).

I. **Eleventh Circuit.**

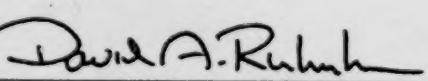
The Eleventh Circuit, while not addressing the issue directly, maintains the minority viewpoint by virtue of its adoption of the case law of the Fifth Circuit.

As the above brief survey demonstrates, the circuits are in disarray on this important and recurring question. A writ of certiorari to the United States Court of Appeals for the Third Circuit should be allowed to resolve this ongoing conflict.

CONCLUSION

For the reasons expressed above, a writ of certiorari should issue to the United States Court of Appeals for the Third Circuit.

Respectfully,
RUHNKE & BARRETT
Attorneys for Petitioners

BY: 
DAVID A. RUHNKE

Dated: August 16, 1985

APPENDIX

Oral opinion of Honorable John W. Bissell, United States District Judge for the District of New Jersey, June 8, 1984.

The Court determines that prior consistent statements whenever made in this case may be introduced under two essential grounds, first pursuant to the language of Rule 801(d)(1)(B) because this Court feels that whatever the pronouncement of counsel may be before it there certainly is a strong implication before this jury based upon the cross-examination of Mr. Gregory that there has indeed been a recent fabrication of his testimony and, secondly, that there is indeed a motive for Mr. Gregory to testify falsely.

The fact that the Government may choose and be allowed to neutralize that motive if it can by reason of other excerpts from the plea agreement, which I mentioned already here today, does not mean that the charge of motivation is wiped away. Quite the contrary.

The Court believes that cases such as *U.S. v. Parotti*, 703 F.2d 768 (4th Cir. 1982) and *U.S. v. Hamilton*, 689 F.2d 1262 (6th Cir. 1982) and the Fourth Circuit court opinion mentioned in both decisions states the better rule with regard to the scope of permissible items that can be used by way of prior consistent statements under Rule 801(d)(1)(B). I agree with those courts that *Quinto* is a narrower application of that rule than the language of the rule itself requires.

I believe further the question of the timing of the statement and hence the impact that that statement may have in light of when motivation arose is a question of weight to be evaluated by the jury. One of the decisions I related to I indicated before expressed that may be a consideration of relevancy. I really don't feel it is. I think it is a question of weight and, secondly, even the Second Circuit through Judge Friendly in I believe it is *U.S. v. Rubin*, 609 F.2d 51, cited in *Parotti*, has indicated that the *Quinto* rule is applicable to only the question of the substantive consideration of the evidence under 801(d)(1)(B).

Judge Friendly has acknowledged that if considered for purposes of rehabilitation of credibility, *Quinto* would not serve as a bar.

At least in the *Parotti* case if not in *Hamilton* also, the sole purpose for which the evidence had been introduced or at least the dominant purpose had been one of rehabilitation. Nevertheless, it is this Court's ruling that the statements regardless of whether they were made before or after the plea agreement may be employed for both purposes here and hence no limiting instruction from the Court will be required.

Anything further before the jurors are brought in?

MR. CAMMARATA: I have one matter. In reviewing my notes last night I discovered –

THE COURT: Pardon me. I want to finish off.

The use of course of credibility purposes has long been acknowledged in the courts, including as set forth in an older Second Circuit case, *U.S. v. Lipton*, as I mentioned earlier, 467 F.2d 761 (2nd Cir. 1962).

Judgment order, United States Court of Appeals for the Third Circuit, May 23, 1985.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5621 and 84-5622

UNITED STATES OF AMERICA

vs.

FRENCH, JERALD, **Appellant in 84-5621**

UNITED STATES OF AMERICA

vs.

MATURO LAWRENCE, **Appellant in 84-5622**

Appeal From the United States District Court
For the District of New Jersey – Trenton
D.C. Criminal Nos. 84-00104-02 and 84-00104-03
District Judge: Honorable John W. Bissell

Argued May 16, 1985

Before: HUNTER, SLOVITER, Circuit Judges, and MUIR,*
District Judge

JUDGMENT ORDER

After considering the contentions raised by apellants, to wit, that the court erred:

(1) In barring the testimony of a defense witness who would have contradicted the

*Honorable Malcolm Muir United States District Judge for the Middle District of Pennsylvania, sitting by designation.

Government's key witness, Elliot Gregory, on a subject raised by the Government in its direct and re-direct examination of Gregory.

(2) In admitting evidence of Elliot Gregory's prior consistent statements.

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

JAMES HUNTER, III, Circuit Judge

Attest:

Sally Mrvos, Clerk
Dated: May 23, 1985

Order denying petition for rehearing, June 19, 1985.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5621 and 84-5622

UNITED STATES OF AMERICA

vs.

FRENCH, JERALD, **Appellant in 84-5621**

Order denying petition for rehearing, June 14, 1985.

UNITED STATES OF AMERICA

vs.

MATURO LAWRENCE, Appellant in 84-5622

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*

The petition for rehearing filed by

APPELLANTS

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court, /s/ James Hunter, III

Judge

Dated: June 19, 1985

Supreme Court, U.S.
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(2)

No. 85-282

In the Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE MATURO AND JERALD FRENCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the district court erred in admitting evidence of a witness's prior consistent statements that responded to a charge of recent fabrication.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Hanger v. *United States*, 398 F.2d 91, cert. denied, 393 U.S. 1119 ..... 8, 9

United States v. *Baron*, 602 F.2d 1248, cert. denied, 444 U.S. 967 7

United States v. *Hamilton*, 689 F.2d 1262, cert. denied, 459 U.S. 1117 ..... 6-7, 9

United States v. *Harris*, 761 F.2d 394 ..... 7, 9

United States v. *Henderson*, 717 F.2d 135, cert. denied, No. 83-5718 (Jan. 23, 1984) 7

United States v. *Parodi*, 703 F.2d 768 ..... 7, 9

United States v. *Parry*, 649 F.2d 292 7

United States v. *Quinto*, 582 F.2d 224 ..... 6, 7, 8, 9, 10

United States v. *Rohrer*, 708 F.2d 429 ..... 6, 7, 10

United States v. *Rubin*, 609 F.2d 51, aff'd, 449 U.S. 424 ..... 7, 8, 9, 10

United States v. *Wilkinson*, 754 F.2d 1427 ..... 8, 10

Page

Statutes and rules:

18 U.S.C. 371 1

18 U.S.C. 659 ..... 1, 2

Fed. R. Evid. :

Rule 403 9

Rule 801(d)(1)(B) 4-5, 6, 7

Rule 801 advisory committee note 6

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-282

LAWRENCE MATURO AND JERALD FRENCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 3A-4A) is unreported. The oral opinion of the district court (Pet. App. 1A-2A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1985. A petition for rehearing was denied on June 19, 1985 (Pet. App. 5A). The petition for a writ of certiorari was filed on August 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners Lawrence Maturo and Jerald French were each convicted on one count of theft of property in interstate commerce, in violation of 18 U.S.C. 659; one count of conspiracy to commit that offense, in violation of 18 U.S.C. 371; and one count of

possession of property stolen from interstate commerce, in violation of 18 U.S.C. 659.[1] French was sentenced to four years' imprisonment on the conspiracy count and to a consecutive term of four years' imprisonment on the theft and possession counts, which were merged for purposes of sentencing. Maturo was sentenced to four years' imprisonment on the conspiracy count and to a consecutive term of two years' imprisonment on the merged theft and possession counts.

1. The evidence at trial showed that petitioners Maturo and French conspired with co-conspirators Elliot Gregory and Herman Max Ruth to steal a truck driven by Gregory for the Fantastic Service trucking company of New Jersey (Fantastic) (2 Tr. 42-55, 68-69). In early March 1984, French and Ruth met with Gregory and told him that he could satisfy a several thousand dollar debt to French by helping them steal a truck loaded with merchandise (*id.* at 68-71). On March 19, Fantastic assigned Gregory to drive a truck to Port Newark and Port Elizabeth, New Jersey, to pick up two loads of women's jackets and shoes (*id.* at 75-77). While in Port Elizabeth with the loaded truck, Gregory stopped near a lunch wagon, leaving the truck untended with the engine running. While he stood at the lunch wagon waiting to make a purchase, he was approached by a stranger who told him that "Mack" wanted to see him. Gregory and the stranger crossed the street and entered a car where Herman Max Ruth (Mack) waited. They drove off toward Jersey City. While on the road, Gregory observed his truck, now driven by petitioner French (*id.* at 84-87).

---

[1]Prior to petitioners' trial, co-defendant Elliot Gregory pleaded guilty to the conspiracy count and agreed to testify for the government. Co-defendant Herman Max Ruth pleaded guilty on the second day of trial to all three counts.

The car was parked in Jersey City. When the truck passed a few minutes later, Ruth left the car, instructing Gregory to remain seated, and walked off in the direction that the truck had gone. Shortly thereafter, Gregory saw Maturo drive by in the same direction and about 45 minutes later Ruth returned to the parked car, told Gregory that his debt to French was satisfied and instructed him to inform his dispatcher that the truck had been hijacked at gunpoint. Ruth ordered Gregory into the trunk of the car and drove to another location where he released him. Gregory reported to his employer and later to the Port Authority police that his truck had been hijacked (2 Tr. 89-97; 3 Tr. 26; 4 Tr. 69).

The next day, Gregory asked French about the truck. French responded that the truck was near Staten Island, stating further that Maturo was expected to call and report whether he had been able to sell the merchandise (3 Tr. 26-27). The same day, police questioned Gregory again and he agreed to take a polygraph test. When the police informed Gregory that the test results indicated that his story was untrue, Gregory broke down and admitted his involvement in the theft, implicating petitioners and Ruth (4 Tr. 69-71).

Petitioners and Ruth were later arrested. Ruth was apprehended in a truck rented by Maturo that contained some of the stolen goods (4 Tr. 80, 97-99; GX 27, 31, 32). At the time of arrest, Ruth was carrying a security officer's badge belonging to Gregory that had been in the truck on the day it was stolen (3 Tr. 28-30; 4 Tr. 87; GX 1). He also carried an address book containing the telephone numbers of French and Maturo (4 Tr. 80, 87; GX 28). Maturo's car contained a piece of paper with the handwritten name "Jerry," the telephone number of French's mother, and the notations "100 jackets" and "52 shoes" (4 Tr. 118-120; GX 36).

2. In his direct testimony, Gregory admitted that he had lied to the dispatcher and the Port Authority police when he told them that the truck was hijacked (3 Tr. 30-31). He stated that he decided to tell the truth because he "couldn't stand the bearing of lying to my wife and keep lying and keep lying and keep lying" (*id.* at 31). When he failed the polygraph test, he had "a chance to let everything off my chest" and "an opportunity to go ahead on and tell the truth then" (*id.* at 32). He also testified that, after deciding to tell the truth, he spoke to FBI special agents (*id.* at 33).

On cross-examination, Gregory was subject to extensive impeachment concerning his prior inconsistent statements (3 Tr. 64-82, 124-126) and his plea agreement (*id.* at 82-83).[2] On redirect examination, over defense objections, Gregory acknowledged that there were inconsistencies between his statement to the FBI and his testimony at trial and stated that his testimony at trial was truthful (*id.* at 131-133). He also explained why he had become confused when he spoke to the FBI agents (*id.* at 133).

After a hearing (4 Tr. 7-20; see Pet. App. 1A-2A), the court permitted the government to elicit testimony from Gregory on redirect examination showing that Gregory's prior statements—following the polygraph test and his decision to tell the truth—were consistent with his testimony at trial (4 Tr. 29-30).[3] The court ruled that this testimony was relevant and not hearsay under Fed. R. Evid.

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[2]He was also questioned concerning his past false statements, made in a security guard application, claiming that he had no criminal record (3 Tr. 57-58, 61-63, 124).

[3]The government, without defense objection, also elicited brief testimony from a police officer who indicated that Gregory's statements immediately after learning of the polygraph results were consistent with his present testimony (4 Tr. 70-71). The government's only evidence of prior consistent statements was testimonial; it did not offer any writing or transcript into evidence.

801(d)(1)(B)[4] because there was "a strong implication before this jury based upon the cross-examination of Mr. Gregory that there has indeed been a recent fabrication of his testimony and, secondly, that there is indeed a motive for Mr. Gregory to testify falsely" (Pet. App. 1A). The court stated that the relationship between the timing of the prior consistent statement and a motivation to fabricate raised a question of the weight of the evidence—to be determined by the jury—rather than a question of admissibility (*ibid.*). The court of appeals affirmed (Pet. App. 3A-4A).

ARGUMENT

Petitioners claim that evidence of Gregory's prior consistent statements should have been excluded because the statements were made after Gregory had a motive to fabricate. (Pet. 5-6). There is some disagreement among the circuits concerning how the timing of prior consistent statements should affect their admissibility. However, that disagreement is largely academic and presently of insufficient importance to warrant this Court's review. In all events, this case does not truly present the issue. Petitioner's premise (*id.* at 4)—that Gregory's failure to pass the polygraph test created a motive to fabricate—is untenable. And even if the district court erred in admitting the evidence or failing to

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[4]Rule 801(d) provides:

> A statement is not hearsay if—
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> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
>
> * * * * *
>
> (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

give a cautionary instruction, that error could not have affected the outcome of the trial.

1. Before the enactment of the Federal Rules of Evidence, the federal courts admitted prior consistent statements as relevant rehabilitative evidence that could be used to rebut charges of recent fabrication or improper influence. See Fed. R. Evid. 801 advisory committee note. Rule 801(d)(1)(B) expanded that practice, providing that such statements were not hearsay and could thus serve as substantive, as well as rehabilitative, evidence. *Ibid.* As the Advisory Committee stated, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally." *Ibid.* The change effected by the Rule is in our view of little practical significance: where the witness has testified, the natural use a jury would make of prior consistent statements is with reference to the witness's credibility, while admission of the statements also as substantive evidence adds little if anything to the substantive evidence already before the jury.

Petitioners are correct insofar as they suggest (Pet. 6-9) that there is some difference of opinion among the courts of appeals as to how Rule 801(d)(1)(B) should be applied in instances where the prior consistent statement was made after a witness developed a motive to fabricate the statement. The Second Circuit has stated that "the proponent must demonstrate that the prior consistent statement was made prior to the time that the supposed motive to falsify arose" in order to avail himself of the rule. *United States* v. *Quinto*, 582 F.2d 224, 234 (2d Cir. 1978). The Ninth Circuit seemingly agrees. *United States* v. *Rohrer*, 708 F.2d 429, 433 (1983). Other courts of appeals, however, have refused for various reasons to recognize *Quinto* as a binding rule. See *United States* v. *Hamilton*, 689 F.2d 1262, 1273 (6th

Cir. 1982), cert. denied, 459 U.S. 1117 (1983); *United States* v. *Parry*, 649 F.2d 292, 296 (5th Cir. 1981). Still other circuits have shown some diversity of viewpoints on the *Quinto* rule. Compare *United States* v. *Henderson*, 717 F.2d 135, 138 (4th Cir. 1983), cert. denied, No. 83-5718 (Jan. 23, 1984) (seemingly following *Quinto*), with *United States* v. *Parodi*, 703 F.2d 768, 785 (4th Cir. 1983) (refusing to follow *Quinto*); compare *United States* v. *Harris*, 761 F.2d 394, 399-400 (7th Cir.1985) (suggesting that *Quinto's* limitation applies only to the use of prior consistent statements as substantive evidence), with *United States* v. *Baron*, 602 F.2d 1248, 1252-1253 (7th Cir.), cert. denied, 444 U.S. 967 (1979) (suggesting that the admissibility inquiry should focus on relevancy). Finally, Judge Friendly has observed that *Quinto's* rather rigid interpretation of Rule 801(d)(1)(B) pertains only to admission of a prior consistent statement as substantive evidence; it does not affect the traditionally flexible relevancy and "completeness" inquiry governing admission of prior consistent statements for purposes of rehabilitation. *United States* v. *Rubin*, 609 F.2d 51, 66-70 (2d Cir. 1979) (Friendly, J., concurring), aff'd on other grounds, 449 U.S. 424 (1981).

Although *Quinto* has generated some difference of opinion, it has not led to divergent results. In all of the cases cited by petitioners save *Quinto* itself, the courts have concluded either that use of the prior consistent statement was permissible despite claims of antecedent fabrication, *e.g.*, *Parry*, 649 F.2d at 296, or that the error was harmless, *e.g.*, *Rohrer*, 708 F.2d at 433. The reason for the uniformity in result is apparent. An objection to admission of a prior consistent statement made after the witness had motive to fabricate relies on the theory that the statement has limited probative value in establishing that the witness's testimony is truthful. See *Quinto*, 582 F.2d at 232. That theory is

debatable.[5] But even if the statement truly has limited probative value, its admission is unlikely to result in any prejudice because the jury can be expected to evaluate and appropriately discount the statement in light of the circumstances in which it was made. Indeed, even the Second Circuit has recognized that admission of prior consistent statements made after a motive to fabricate has arisen may simply amount to harmless error. See *United States* v. *Wilkinson,* 754 F.2d 1427, 1433 (1985); *United States* v. *Rubin,* 609 F.2d at 64. Exceptional circumstances may arise, such as in *Quinto,* where there may be legitimate concern for serious unfair prejudice.[6] But in those cases, the

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[5]For example, admission of a prior consistent statement, made after an alleged motive to fabricate arose, can assist the jury in understanding the whole of the witness's testimony. As the Eighth Circuit stated in *Hanger* v. *United States,* 398 F.2d 91, 105 (1968), cert. denied, 393 U.S. 1119 (1969):

> [I]n the situation where a key witness admittedly changes his story or his recital of important relevant events and admits that his former statements in regard to the proceedings in question were a fabrication, * * * he should be allowed to not only testify as to what he now swears is a true recital of the events, but to also testify as to the reasons for his fabrication and the reasons why he decided to change his story; and all of the incidents and factors that shed light upon his credibility, both pro and con, are admitted, subject to the Court's discretion, and left to the jury for its evaluation and determination. Naturally, a person who has made admittedly inconsistent statements stands impeached, but the court and the jury are still charged with the responsibility of ascertaining which evidence is to be credited and only by a full exposure of the relevant and pertinent facts in this difficult situation can the jury make an intelligent and reasonable attempt to ascertain the truth.

[6]*Quinto*'s finding of prejudicial error was premised on the admission of an "eight-page, single-spaced IRS report" (582 F.2d at 235) that described the government's case against Quinto, that appeared "official and authoritative" (*ibid.*) and that "probably became the single most important piece of evidence, testimonial or documentary, against Quinto" (*id.* at 236).

courts that generally would admit the prior consistent statements could presumably exclude them pursuant to Fed. R. Evid. 403.

Thus, while the courts have not been completely uniform in addressing the concerns raised by *Quinto*, their differences are relatively minor and, as a practical matter, do not lead to inconsistency in result. The largely academic disagreement among the circuits on this issue therefore would not warrant this Court's review even if it were squarely presented.

2. In the present case, the district court correctly permitted the government to elicit testimony concerning Gregory's prior consistent statements to rebut petitioners' charges of recent fabrication. The government was entitled to show that Gregory had maintained an essentially consistent story from the time he was confronted with the results of the polygraph test and agreed to tell the truth. When a witness has maintained different versions of the facts at various times, evidence as to when and why the witness altered his story is highly relevant to his credibility. See *Hanger* v. *United States*, 398 F.2d 91, 105 (1968), cert. denied, 393 U.S. 1119 (1969). The jury could not make an intelligent assessment of Gregory's credibility without a complete picture of when and why he changed his version of the facts. See, *e.g.*, *Harris*, 761 F.2d at 399-400; *Parodi*, 703 F.2d at 785-787; *Hamilton*, 689 F.2d at 1273-1274; *Rubin*, 609 F.2d at 66-70 (Friendly, J., concurring).

The district court was correct, even under the *Quinto* rule, in admitting his statements without a cautionary instruction limiting their use. Petitioners contend that *Quinto* would require exclusion of statements Gregory made after he failed the polygraph test because "his motive to fabricate arose at the time he realized his lies to the Port Authority Police would not hold up" (Pet. 4). However,

that statement is plainly a non sequitur. A suspect, told that he has failed a polygraph test, is highly unlikely to respond by giving credence to the polygraph results, admitting that he lied, and then lying once more. Gregory, confronted with polygraph evidence that his original story was untrue, accepted the futility of his fabrications and had no incentive to lie further. Petitioners are therefore mistaken in suggesting that the *Quinto* rule is applicable to the present case.

Even if it be assumed that *Quinto* would have required exclusion of Gregory's prior consistent statements or would have subjected them to a limiting instruction, it is clear that the admission of the evidence did not seriously prejudice petitioners. The government introduced sufficient evidence establishing petitioners' guilt to assure a conviction even in the absence of Gregory's prior consistent statements. The brief testimonial evidence of those statements amounted to only a few pages in a several hundred page transcript (see 4 Tr. 29-30). Under the standards applied by the courts that follow *Quinto,* the error would be considered harmless. See *United States* v. *Wilkinson,* 754 F.2d at 1433; *United States* v. *Rohrer,* 708 F.2d at 433; *United States* v. *Rubin,* 609 F.2d at 64. Unlike the situation in *Quinto,* that evidence did not represent "probably * * * the single most important piece of evidence" against petitioners. *Quinto,* 582 F.2d at 236. And, as previously noted, to the extent petitioners are correct in claiming that the evidence was irrelevant, it equally follows that the jury's decision would not have been affected by its admission. Thus, this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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